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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.
No. .....

RUBBER CORPORATION OF CALIFORNIA,
Petitioner,

vs.

NATIONAL SPONGE CUSHION CO., INC.,
Respondent.

Respondent's Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I.
Background.

The Motion for a New Trial, upon which the present Petition for a Writ of Certiorari is based, was denied by the District Court, denied by the Court of Appeals for the Ninth Circuit, and now the petitioner is endeavoring to reverse the concurring decisions of the District and Circuit Courts.

II.
Filed Too Late?

The petitioner here prays that a writ of certiorari may issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on February 8, 1961 [Tr. pp. 142-150]. A Petition for Rehearing of

that judgment was denied on March 21, 1961 [Tr. p. 152]. The present Petition for a Writ of Certiorari was filed in this Honorable Court in November, 1961, or approximately eight months after the final decision of the Court of Appeals which petitioner now wishes to have reviewed. It is believed that this Petition comes approximately five months too late in order for this Honorable Court to review the judgment of the Ninth Circuit. The time within which petitioner should have filed a Petition for a Writ of Certiorari expired ninety (90) days after the Petition for Rehearing was denied, to wit, in June, 1961, ... U. S. C. §2101(c)*

The authorities appear clearly to hold that the present Petition should have been filed within ninety (90) days of the denial of the rehearing on March 21, 1961.

> "It is insisted by counsel for the petitioner that it is within our power and it is our duty on this writ to go into the merits of the issue of the validity of the Smith patent. . . . The application for this second writ of certiorari which we are now considering was not made until May 22, 1922, more than three months after the final decree in the circuit court of appeals for the payment of profits. Section 6 of Act of September 6, 1916 (Chap. 448, 39 Stat. at L. 726, 727, Comp. Stat. § 1228a, Fed. Stat. Anno. Supp. 1918, p. 422), directs:

*"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

"'That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of.'

"This deprives us of jurisdiction to consider the merits of the decree of October, 1921.

"In the case before us, the decree of October, 1921, which we declined to review in January, 1922, was a final decree, and we are expressly denied power to review it after three months."

Toledo Scale Co. v. Computing Scale Co., 1922, 261 U. S. 399, 417, 67 L. Ed. 719.

"Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition."

Citizens' Bank of Michigan City v. Opperman, 1919, 39 S. Ct. 330, 249 U. S. 448, 63 L. Ed. 701.

"The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing."

Gypsy Oil Company, Petitioner v. Lee Bennett Escoe, a Minor, by O. W. Stephens, Guardian, etc., 275 U. S. 498, 72 L. Ed. 393.

It would appear, therefore, that the present Motion for a New Trial did not extend the time within which the petitioner should have filed its present Petition for a Writ of Certiorari, inasmuch as the present Petition is at best only "a second request for rehearing" of the Ninth Circuit's judgment, and at worst it is a brand new motion for new trial that is based upon an alleged new set of facts. In either event, it is believed the present Petition was filed five months too late as far as the final judgment of the Ninth Circuit on March 21, 1961, is concerned.

III.
Later Motion.

The petitioner has joined two petitions in its present Petition for a Writ of Certiorari, viz., (1) a petition to review the above judgment of the Ninth Circuit, of February 8, 1961; and (2) a Motion for Permission for the District Court to Decide On Its Merits defendant's Motion for a New Trial, under Rules 59 and 60 F. R. C. P. The latter Motion for a New Trial is a separate and distinct proceeding from the said first Motion, and is based upon alleged newly-discovered evidence. This Motion for a New Trial does not ask for reconsideration of the Ninth Circuit's judgment of February 8, 1961, because it only asks for a new trial in which to present some purportedly new evidence. Thus, we have two entirely different Motions in the present single Petition.

The filing of said Motion for a New Trial in April, 1961, did not toll the running of the ninety (90) days within which petitioner was required to file its Petition for a Writ of Certiorari, from the denial of a re-

hearing on March 21, 1961. The petitioner did not extend this ninety-day period, by filing a separate Motion for a New Trial based upon alleged newly discovered facts, as explained above.

Therefore, only the petitioner's Motion for a New Trial is before this Honorable Court.

IV.
Question for Review.

The petitioner has presented two rather vague and difficult-to-understand questions for review in this case. During the hearing before the Court of Appeals on the petitioner's present Motion for a New Trial, Judge Pope of the Ninth Circuit, who presided at the hearing, asked the present petitioner's counsel a rather embarrassing question which is believed to state more accurately the question involved in this petition for certiorari than the rather involved, ambiguous questions presented by petitioner. Of course, no record was made of the oral hearing before the Court of Appeals on said Motion but to the best recollection of the undersigned, Judge Pope's question to opposing counsel was substantially as follows:

> "If you had some evidence available at the time of trial, which you chose not to use until after an appeal had been heard and decided against you, could you then come in and ask for a new trial to prove the evidence which you chose not to use at the trial?"

It is sincerely believed that the above is an accurate report of Judge Pope's question. If counsel for the petitioner here disputes this, then the undersigned will adopt it as his own suggestion of a clearer word-

ing of the only question involved in the present Petition, although the authorship thereof is not claimed because the idea was prompted by Judge Pope's question which the above is believed to accurately reproduce as to substance.

V.
Too Late for a Motion for New Trial?

If petitioner's Motion for Permission for the District Court to Decide On Its Merits Defendant's Motion for a New Trial is the same as, or governed by the same rules as, a Motion for a New Trial (which it is believed to be), then even that part of the present Petition appears to have been tardily filed.

It would appear from Rule 59(b)* that a Motion for a New Trial should have been served not later than ten days after the entry of the judgment on the Petition for Rehearing, to wit, March 21, 1961. The date of petitioner's Motion for Permission *re* its Motion for New Trial is April 13, 1961. Obviously, the petitioner here has not complied with Rule 59(b) as to the time within which a motion for new trial should have been served after the entry of the judgment.

VI.
What Are Petitioner's Grounds?

The second half of the second part of the Motion here is for relief under Rule 60(b), from the judgment of the Ninth Circuit refusing a new trial. It will, however, be noted that petitioner is very careful not to choose which of the grounds in Rule 60(b) it

*"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948."

claims to come under. The petitioner made it clear before the lower court, whose decision was appealed from, and which is now before this Honorable Court, that it urged that the present facts constituted "newly discovered evidence . . . which could not have been discovered before trial by the exercise of reasonable diligence." [See Harrington Affidavit, Appendix B, annexed to this brief].

Nowhere in its present Petition does the petitioner state whether it contends that the alleged laboratory model, which they recently built, was not produced at the original trial hereof because of "mistake," "inadvertence," "excusable neglect," "newly discovered evidence," "fraud" or "any other reason," all being grounds under Rule 60(b). It is believed that none of these grounds exists in the present case, as explained hereinafter.

VII.

What Are Facts in This Case?

At the trial of this case the petitioner (the infringer) relied heavily upon prior Blair-Bodle patent No. 2,480,316, which will hereinafter be referred to as '316. A copy of this patent '316 was introduced by the petitioner at the trial and it was emphasized to the jury at the time the case was submitted for their verdict. The peitioner admitted that it relied heavily upon this patent at the trial of this case. [Tr. Vol. IV, p. 3, lines 18-20 of Proceedings on May 1, 1961 before Lower Court].

The trial in the district court in this case was conducted from May 27, 1958 to June 11, 1958. It was not until April, 1961, or almost three years later, that the petitioner-defendant got around to building a purported

laboratory model of the machine shown in patent No. '316, which it now claims disproves the statements made by the Court of Appeals as to this patent. The main question, then, in this case, is whether a litigant can obtain a new trial after an appeal has become final, on the ground that it did not make the model of a patent at the time of the trial, which patent it knew all about because it heavily relied upon same at the trial. The petitioner could just as easily have built three years before what it built three years later.

It appears that the petitioner is lacking in diligence since no valid reason is given why it could not have made the model previously. That due diligence in obtaining the evidence must positively be shown, see *Raske v. Raske*, 92 Fed. Supp. 348, as follows:

> "Due diligence to obtain the evidence must be shown to justify a new trial upon the basis of newly discovered evidence."

The error of the petitioner in not making the purported model at the time of the trial was not a mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or any other reason which would appear to warrant a new trial. The only thing newly discovered is that the petitioner now thinks that such a model might have been of value.

The respondent here believes that it has a complete answer to the petitioner's claim that the product of the laboratory model lately made by the petitioner anticipates the patent in suit. However, that relates to the merits. As stated by the petitioner on page 16 of its Petition, the said petitioner is not requesting this Honorable Court to decide the merits of petitioner's Motion (after spending ten pages on the merits thereof).

VIII.

Petitioner Asks More Delay.

It has taken over five years (almost one-third of the life of the patent in suit), to get to this point in the litigation and if a new trial be granted on this matter (which the petitioner could just as easily have produced at the time of trial), then petitioner would undoubtedly appeal from such a second trial, again ask for a rehearing in the Court of Appeals, and again petition this Honorable Court in connection with such subsequent trial. This further delay would appear especially burdensome because it is based upon the false premise that the petitioner has the option of deciding not to use certain evidence available to it at the trial, and later on be granted a new trial when it decides that it should have presented such evidence in the first place.

At the time of the trial and during the first appeal in this case, the petitioner advanced the same theory that it presents now. It should be borne in mind that the patent in suit is not on the machine but is on sponge rubber carpet-underlay material that provides a cushioning effect under a carpet. The petitioner's theory is that the machine shown in patent '316 can be made to produce the present patented product, and they claim to have made "tests" three years too late to prove this.

It did not take petitioner very long to build whatever it has now built (which has never been shown to respondent), since the machine was built between March 21, 1961 and April 13, 1961 (respectively, the date of the Court of Appeals denial of rehearing and the date of petitioner's Motion for a New Trial based on the

"machine"). Thus, the alleged machine was built and purported products thereof were produced in not more than 23 days. No doubt the petitioner could just as quickly have built this experimental, laboratory "machine" three years before for the trial of this case, if it had so desired. Obviously, whatever the petitioner has done lately it could have done, by the exercise of reasonable diligence, at the time of the trial of this case.

At the trial, the petitioner offered in evidence both drawings and specification of this "machine," since they are contained in patent '310. Now, petitioner asks for a new trial merely to offer in evidence the physical counterpart of the same thing that it offered in documentary form at the trial. This physical evidence would be merely cumulative as far as that patent is concerned. The same amount of activity three years before would have produced this same model. This evidence was not "newly discovered." The petitioner's only subsequent discovery is the alleged *importance* of the evidence.

IX.
"New" Evidence Already Considered.

The petitioner argues here that it has the right to be heard "on the merits" of this patent '310. What is believed to be a complete answer to this contention is that the Court of Appeals for the Ninth Circuit has already considered the subject matter of this patent "on the merits." The petitioner has already had its "day in court" as to this patent.

It is believed that the Court of Appeals without question decided this same argument on its merits, during petitioner's first appeal. This precise contention clearly

was given in petitioner's "Answering Brief" and in its "Petition for Rehearing [annexed hereto as Appendix A]. It will be noted at the bottom of page 8 of the present Petition that the petitioner argues that if patent '310 is practiced as taught it "will inherently result" in the production of the product of the patent in suit. Then on page 9 of the present Petition, the petitioner argues that the key-lock of the patent in suit is "an inherent and inescapable result" of the teaching of this prior art patent.

In its original "Answering Brief," the petitioner made these same arguments to the Court of Appeals for the Ninth Circuit. As shown by said "Appendix A," the petitioner at that time quite exhaustively argued that patent '310 "must of necessity" key-lock and that "the only conceivable result" of patent '310 is the present product. Moreover, that the product of patent '310 "would of inescapable necessity" comprise sponge rubber having a key-locking engagement with the fabric.

As evidence that the Court of Appeals fully considered this argument, so that the petitioner had its day in court "on the merits" of this argument, it should be noted that the Court of Appeals in the footnote on page 145 of the record here states as follows:

> "Appellee suggests that since this patent contemplated the use of blowable cellular or sponge rubber, that the blowable sponge rubber would project into and through the open mesh fabric thereafter widening and forming the key-lock referred to in plaintiff's claims. There is no evidence to support such a contention, and nothing in the Blair-Bodle patent to suggest that any such thing was con-

templated. On the contrary, the patent suggests quite the opposite. It states that the heated rubber 'is soft enough so that it will gravitate into the channels of the shaping drum.' It suggests that a suction pull may be added to that of gravity. The quoted description refers to a pull by gravity or suction precisely opposite to that which is described in plaintiff's patent. This gravitating into the channels of the shaping drum is a process to form the waffle-like ridges or projections, the push or pull being away from and not toward the fabric."—286 F. 2d 731, 733 (1961).

It should be noted that this is the decision of the Court of Appeals for the Ninth Circuit which has become final, since no Petition for a Writ of Certiorari was filed in this Honorable Court within three months after the final decision when the Petition for Rehearing was denied on March 21, 1961. Thus, the Court of Appeals has already finally determined on its merits that the product of patent '316 will not inherently result and that a key-lock is not an inherent and inescapable result of that patent.

The petitioner argues that it has had no "opportunity to be heard on the merits of its motion." This is not correct. They have already passed by two opportunities, to wit, the trial three years before, and the Petition for Reconsideration, supported by the Bodle affidavits, two years before. Now, petitioner wants a *third* opportunity. There should be an end sometime.

In summary of this part of this brief, it is believed that the purported laboratory model, which petitioner now wishes to offer, is not "newly discovered evidence,"

and that petitioner's extreme tardiness in not bringing it forward three years before at the time of the trial constitutes inexcusable neglect. This is not the case of some records that were lost at the time of trial and later discovered, nor is there any new "discovery" in connection with this purported machine, because it is both shown and described in patent '316 that was offered in evidence at the trial. The petitioner has at all times relied heavily upon this patent, and has made this same argument, based on this patent, both at the time of the trial and on the two appeals to the Court of Appeals in this case. What the petitioner alleges is that now it has made a "machine." It could of course have made or "discovered" this same machine before the trial of this case by the exercise of reasonable diligence, because the information concerning it was available to petitioner throughout the trial in this case. The same activity at the time of the trial would have produced whatever model it has now made. This is not subsequently discovered evidence; the petitioner only subsequently discovered that they thought the evidence was important. Its arguments of what it now claims this machine proves have already been repeatedly and vigorously voiced. Their contentions have been made over and over again, at the trial, on the first appeal, and on the second appeal. The Ninth Circuit has ruled twice against petitioner. Petitioner has had more than its day in court on this oft repeated argument.

X.

Circuit Court Decision Not Based on Affidavits.

The petitioner here has set up a straw man and then endeavored to knock him down. It is the contention of the petitioner that the Court of Appeals had a "parallel theory" to certain affidavits filed herein. It is not clear what a "parallel theory" is. If petitioner means that the Court of Appeals arrived at the same conclusion as the affidavits, then to that extent they are similar, not parallel. If the petitioner means that the evidence upon which the Court's decision and the affidavits were based is the same, then it is believed that the petitioner is in error.

One very important point in this connection is that the Court of Appeals did not base its decision upon the Bodle affidavits which petitioner attacks so strenuously in its present Petition. The petitioner's "Argument" in its second appeal in this case, admitted that the Court of Appeals "makes no mention of the affidavits of Bodle" [Tr., Vol. V, p. 2 of "Argument" —third p. "2" of this Vol.]. As noted in the quotation *supra* from the Ninth Circuit case, quoted from page 145 of the Transcript, the Circuit Court based its conclusions entirely upon the patent itself. For instance, the said portion of the Circuit Court's decision states, "On the contrary, the patent suggests quite the opposite. It states. . . . It suggests. . . . The quoted description [of patent '316]. . . ." Also see the statement that there is "nothing in the Blair-Bodle patent to suggest that any such thing was contemplated." In other words, the patent itself was the entire basis of the Ninth Circuit's decision that what the petitioner is now urging was not contemplated by

those patentees. It is believed that the careful analysis of this patent '316 by the Court of Appeals is extremely accurate and carefully considered after strenuous arguments by the petitioner to the contrary [see Appendix A hereto].

Thus, it is believed that the several pages of the present Petition which attack the affidavits of Bodle are of little consequence since the Court of Appeals based its decision, not upon said affidavits, but upon the Blair-Bodle patent '316 itself. However, it is believed that the Court of Appeals would have been correct in basing its decision upon said Bodle affidavits, if it had done so.

Even if said affidavits had been the basis of the Court of Appeals' decision, it should be noted that the petitioner here failed and neglected to make any answer whatsoever to the Bodle affidavits which were filed in April and May, 1959, until after the Petition for Rehearing on the appeal had been denied in March, 1961, or almost two years later. Thus, there was inexcusable neglect on the part of the petitioner to come forward with any such purported laboratory model for some two years after the date of the affidavits which it belatedly wishes to dispute. In other words, the Bodle affidavits were entirely undisputed by petitioner for almost two years, as far as building a machine was concerned, which is the only basis for the present Petition. In fact, the only claim that the petitioner is now making is that it has now built some sort of a laboratory model which it never built before, although it could have.

XI.

District Court Decided "on Its Merits."

It is believed that the District Court decided the present subject matter upon its merits in the proceeding on May 1, 1961 (Vol. IV), since that Court held that petitioner had come into the District Court with the same thing that it had presented at the trial. The District Court stated as follows:

> "When you came in with it before, you came in with the documentary evidence. Now you propose to come in with the machine. I don't think you have got a prayer on this motion, but go ahead and make it." [Tr., Vol. IV, p. 3, lines 13-16].

That is to say, exactly the same subject matter was before the lower court at the time of the trial in 1958, and the petitioner in 1961 was merely offering a small, experimental model which it claims to be a "counterpart" of what is in patent '310 [Tr., Vol. IV, p. 6, lines 10-12]. Thus it appears that the District Court decided on its merits that the petitioner was merely trying to bring in the same thing in physical form which it had in documentary form at the time of the trial three years before. This, the District Court said, on its merits, cou'd not be done. The District Judge implied that this counterpart of what was offered at the trial was not "newly discovered evidence" or "any other reason" for relief from the judgment.

While the District Court felt that said patent did anticipate the patent in suit, nevertheless, in view of the Court of Appeals' final judgment that it did not, District Judge Tolin felt that the petitioner could not now come in with a model in alleged physical form, when

the same subject matter was considered carefully by the Court of Appeals in documentary form.

The petitioner is fond of saying that the District Judge agreed with petitioner's contention that the patent in suit was invalid. However, the Lower Court was *reversed* by the Court of Appeals on this point, in a decision that is now final. The District Judge did, however, decide on its merits that the petitioner could not at this late date come in with an alleged physical embodiment of the same thing that it presented in documentary form at the trial, and that the petitioner did not have "a prayer" to do that. The District Court was *affirmed* on this point, and that is the only question involved in the present motion (not whether the patent in suit is valid or invalid).

The petitioner has tried to discredit the Bodle affidavits by saying that they were "unsubstantiated, self-serving, *ex parte* affidavits." The fact that they were under oath and undisputed by the petitioner for almost two years would appear to indicate that they were substantiated. It would appear that all affidavits are self-serving in the meaning of assisting the party who submits them. If they did not help to serve the party's cause, they would not be filed. Moreover, it is not a valid objection that an affidavit is "*ex parte*." It is very seldom that an affidavit is joined in by both sides so that practically all affidavits are *ex parte*. Thus, none of these epithets used by petitioner seems to disparage the affidavits in question.

The petitioner also labels these affidavits as "late." It should be noted in answer to this that the affidavits were in support of the respondent's Petition for Reconsideration of the judgment by the District Court.

They were filed seasonably for that purpose and no contention has been or can be made that they were not filed in due time in support of that Petition. Obviously a party could not file affidavits in support of a petition for reconsideration of a judgment, prior to the entry of such judgment. Thus the position of the petitioner seems untenable since said affidavits were believed clearly filed at the proper time in support of said Petition for Reconsideration.

XII.

Petitioner Gambled on District Court Decision.

The petitioner endeavors to excuse its long delay in building the small laboratory model, which they have now purportedly constructed, by stating that there was "no earlier need for it." However, petitioner gambled that there would be no need for it at the trial, and gambled that the District Judge would rule for them on the respondent's Petition for Reconsideration. It was a gamble because the petitioner undoubtedly did not know *in advance* that the District Judge was going to rule in petitioner's favor on said Petition.

The petitioner won its gamble before the District Court because the District Court denied the Petition for Reconsideration, but it later developed in this case that there was a "need" for it before the Court of Appeals two years later. Even then, despite the "need" for it, the petitioner did not build whatever it has now built until after final judgment by the Court of Appeals and after denial of the Petition for Rehearing. Then, and only then, in order to be able to file a Motion for a New Trial and for Relief from the Judgment, did the petitioner finally decide to build an experimental, lab-

oratory model, to try to substantiate its oft repeated theories of patent '316.

The petitioner has also complained that it did not have time enough in which to make this alleged machine between the filing of the Bodle affidavits and the denial by Judge Tolin of the respondent's Petition for Reconsideration. In the first place, the petitioner did not request any additional time (the respondent has stipulated to every extension requested by the petitioner in this case).

The respondent is willing to stipulate that the petitioner does not agree with the Bodle affidavits or with the Court of Appeals for the Ninth Circuit, but whether petitioner would like to dispute same now is not the question. The question now is whether this small laboratory model, which it could have built three years before, at the time of the trial, is "newly discovered evidence," or whether petitioner is guilty of inexcusable neglect in failing to do then what it very quickly did last spring. The petitioner admitted at the hearing before the Court of Appeals in this matter that they did not know whether this was "newly discovered evidence," but that Rule 60(b)(6) includes the catch-all phrase "any other reason." However, it is submitted that "any other reason" does not apply to a party who delays three years in bringing forward what it could have produced at the time of the trial.

By logic, if the Court of Appeals carefully considered the subject matter of the documentary proof of patent '316 (which the record shows it did and which is undisputed by petitioner), and if the model which petitioner has purported to have built is the "counterpart" of said patent '316 (as it claims), then the in-

escapable conclusion is that the Court of Appeals did consider the subject matter of the "machine" on its merits, since things equal to the same thing are equal to each other.

XIII.

Does Petitioner Admit Evidence Not "Newly Discovered"?

Ever since the present petitioner argued in its first brief that the present evidence, which it now wishes to present, was "newly discovered evidence," and that it could not have been produced at the time of the trial by the exercise of reasonable diligence, it has been soft pedalling the argument that this evidence is newly discovered. However, the very basis of its petition here is that it is trying to convince this Honorable Court that said evidence is newly discovered, and that they should now be permitted to come forward with it.

The petitioner faces a dilemma in this connection, since obviously the evidence is not "newly discovered," and petitioner is impliedly admitting that it is not since it has not lately made this argument. Of course, evidence that was available to it at the time of the trial can scarcely at this late date be called "newly discovered." On the other hand, the petitioner is compelled not to admit that it is not newly discovered because that would be admitting their laches in bringing forward this evidence.

XIV.

Post-Trial Experiments Are Not "Newly Discovered" Evidence.

The only thing that petitioner even claims to have at this late date are post-trial experiments which it contends prove its theory of the evidence that it offered at the trial. The conducting of post-trial experiments by a party in an effort to prove its theory of a case, which it presented at the trial, has been held not to be a proper basis for granting a new trial. See the following case, in which the Court of Appeals for the Tenth Circuit held that it should first be shown by the moving party that this evidence was not obtainable when it was the proper time for it to be brought forward:

> "The appellants contend that the verdict of the jury was contrary to the overwhelming weight of evidence in the case, and that the trial court abused its discretion in refusing to grant a new trial. They contend that in any event, *the court should have granted a new trial upon newly discovered evidence, disclosed by post-trial experiments conducted by appellants' expert, which is claimed to completely disprove the defendant's theory of the case as advanced by its expert.* But we think the court was well within its wide latitude of discretion in refusing to grant a new trial for either reason. . . . In any event, the evidence presented a jury question *and the newly discovered evidence developed by further experimentation related to the appellee's theory of the cause of the fire And, there is nothing to indicate that it was not*

obtainable during the trial of this case." (Emphasis added.)

Taylor v. Reo Motors, Inc. (10 Cir., 1960), 275 F. 2d 699, reversed on other grounds.

In a recent (November 16, 1961) decision of the Ninth Circuit, in *Locklin et al. dba Radiant Color Co. v. Switzer Bros., Inc.*, ... F. 2d ....., 131 U. S. P. Q. 294, post-decision tests were held properly rejected for failure to show justification of failure to present these matters at the time of trial:

> "It offered testimony relating to post-decision tests run by it. . . .
>
> "All of this evidence was rejected by the district court for failure of Radiant to show diligence or justification for its failure to discover and present these matters at the time of trial. . . . The time for testing of proof is the time of trial. Our judicial system does not contemplate that the rights of litigants shall be held in abeyance for months or years in order that hindsight may provide a more accurate appraisal of evidence."

The Court of Appeals for the Ninth Circuit has also held that when the same degree of activity would have produced the purported evidence at the time when it should have been raised, an untimely offer of the evidence in a Motion for a New Trial should be denied:

> "The application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been

exercised prior thereto. 39 Am. Jur. § 161, p. 168."

United States v. Branson (9 Cir., 1944), 142 F. 2d 232, 235.

"The application for a new trial will be denied where the degree of activity which led to the discovery of the evidence post-trial would have produced it had it been exercised prior to trial."

Eastern Air Lines, Inc. v. United States, 110 Fed. Supp. 409.

"After-investigation cannot supply, as newly discovered evidence, something that the defendant might have gone into before the trial, if it had been considered material."

Skerman v. Philadelphia & R. Ry. Co., 255 Fed. 85.

Failure of a party properly to evaluate evidence earlier is not ground for a new trial. See the following from *Aerated Products Co. v. Aeration Processes*, 95 Fed. Supp. 23 (S. D. Cal. 1950, Yankwich, J.):

"But liberal though the courts are in interpreting these new rules, they do not permit a litigant to seek a new trial upon the ground that there existed evidence which the counsel who tried the case failed to present to the court because of his *failure to evaluate it properly*. The principle was summed up by the late Judge Garrecht in one brief sentence: 'Subsequent discovery of the importance of evidence which was in the possession of applicant for new trial, at the time of the trial, does not entitle him to a new trial upon the ground

> of newly discovered evidence.' United States v. Bransen, 9 Cir., 1944, 142 F. 2d 232, 235." (Emphasis in original.)

Also from the same case:

> "Judge Garrecht used the language just quoted in which the court gave approval to the principle that the newly-discovered evidence rule does not include failure to evaluate properly evidence available at the time of trial. Or, as it has been otherwise put, it must be made to appear that the evidence proffered is 'in fact newly discovered and not merely the importance of it.' 66 C. J. S., New Trial, § 101, p. 293, and see Bradbury Estate Co. v. Carroll, 1929, 98 Cal. App. 145, 153-155, 276 P. 394."

The authorities cited by petitioner do not seem to be in point, since it does not appear in any of them that any court has ever allowed a party to re-try an issue on the ground that a party made a post-trial experiment some three years after the trial, where the same activity would have produced such experiment at the time of the trial. Nor has any court, cited by the petitioner, granted a new trial where only the importance of the alleged evidence was discovered after the time of the trial. Nor has the petitioner cited any authority in which a belated "physical embodiment" of a patent has been accepted years later as basis for a new trial when that very patent was heavily relied upon at the trial of the case.

XV.

(1) Late. (2) Late. (3) Late.

The petitioner here seems consistently to follow a pattern of being too late. It has been too late in at least three phases of this case. Strictly speaking, the Affidavit of Robert Cummings and the Supplemental Affidavit of Harry Schrage of April 19, 1961 were filed too late. These Affidavits were not served with the present Motion for a New Trial dated April 13, 1961, as definitely required by Rule 59(c).*

It is believed that these Affidavits should not be considered for this reason alone, although of course respondent believes that the subject matter of all of the affidavits submitted with the present Petition are objectionable for the reasons given hereinbefore.

The second late offering by petitioner is its lateness in offering its post-trial experimental model, which was delayed three years after the trial and two years after the Bodle affidavits which the petitioner is allegedly now trying to rebut.

The third lateness of the petitioner is that it did not within ninety (90) days petition for a writ of certiorari in connection with the now final judgment for the Court of Appeals for the Ninth Circuit dated February 8, 1961 and in which the rehearing was denied on March 21, 1961.

---

*"59(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion . . ."

XVI.

Public Not Interested.

The petitioner waited until the very end of its Petition to fire a Parthian shot, to wit, that the question involved in this case if "of importance . . . to the public." Presumably the petitioner means by this statement that if the question they have raised is not decided in the present proceeding, and if it might have been decided in their favor, then the public will be the loser. The premises of the petitioner are believed to be false. This identically same question will be tried in another case, filed in the Southern District of California, in June, 1961, to wit, the case of *National Sponge Cushion Co., Inc. v. The Mansfield Tire & Rubber Co.*, No. 711-61-TC. The Complaint and Answer in the latter case are enclosed herewith as "Appendix C." It will be noted in paragraph 11A of the defendant's Answer in the latter case that this selfsame defense will be litigated:

> "The product or article of manufacture forming the subject matter of the claims of said patent is identical with or not patentably distinct from the product or article of manufacture naturally and inherently produced by practicing the method and using the materials and apparatus described in United States Letters Patent No. 2,480,316, in the name of G. W. Blair and V. H. Bodle entitled, 'Method of Making Laminated Cushion Material' and issued August 30, 1949, a date more than one year prior to the filing date of the application which resulted in the issuance of said patent No. 2,740,739."

William E. Faulk, General Manager of the Mechanical Rubber Goods Division of the defendant The Mansfield Tire & Rubber Company in said latter case, was a witness for the petitioner at the trial of the present case, after his deposition had been taken twice. Because of the working arrangement between the defendant here and the said Mansfield Tire & Rubber Company, as shown by the above-quoted part of latter's Answer, the present petitioner has obviously passed on to The Mansfield Tire & Rubber Company its theory of patent '316, which it is trying to assert in the present case. It seems obvious that one company knows what the other one knows about patent '316 and about said experimental "machine." Thus, there will be a full and complete adjudication in the latter case upon this very subject, so that the interest of the public will be fully protected, and this question will not go down in the records unsolved because of a denial by this Honorable Court of a writ of certiorari in this case, as wrongly inferred by petitioner. The present Petition, therefore, only affects this particular, thrice-tardy petitioner and has no significant effect upon "the public."

XVII.
End of Litigation.

This litigation had been pending five years last October. The appellant has been infringing from the very day the patent was issued in April, 1956.

The patent in suit, like any other utility patent, is only good for 17 years. One-third of the term of this patent has now expired, during all of which time the defendant has continuously infringed it. The delay in this litigation is long and serious and has greatly

damaged the respondent by having a strong competitor producing practically the same material and selling it in the same market over such a long period. One-third of the value of respondent's patent has been greatly undermined by persistent infringement by the petitioner despite the final ruling of validity and infringement by the Court of Appeals for the Ninth Circuit.

As stated by this Honorable Court, it is a salutary rule that there must be an end to litigation, and not litigate the same thing over and over again. See the following inspirational statement from *Toledo Scale Co. v. Computing Scale Co., supra:*

> "We cannot know what the result of the hearing would have been on this issue if tried, because only one side is presented. We are prevented from knowing it by a most salutary rule of law, which, after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which, with due diligence, they ought to have discovered before the hearing. The apparent hardship of particular cases should not and cannot weigh against the application of this sound principle. As Mr. Justice Story remarked in Ocean Ins. Co. v. Fields, 2 Story, 59 Fed. Case No. 10406: 'It is for the public interest and policy to make an end to litigation; or, as was pointedly said by a great jurist, that suits may not be immortal while men are mortal.'"

XVIII.
Conclusion.

It is believed that the present Petition for a Writ of Certiorari should be denied due to the inexcusable delay in being three years late in conducting an alleged post-trial experiment in connection with its theory of a patent that was strongly relied upon at the trial, and where the same activity would have produced the alleged "physical embodiment" in due time to be presented to the jury which tried this case. The only excuse by the petitioner is not that it could not have done the same thing three years before, but that it did not at that time recognize the purported importance of a physical embodiment.

A mistake by the petitioner as to the importance of evidence, which it had available at the time of the trial, is not sufficient ground to grant a new trial or relief from the present judgment, because it is not "newly discovered evidence" nor is it "any other reason" for granting a new trial.

Thus, there are no "special" or "important reasons" for granting a writ of certiorari in this case.

Respectfully submitted,

RICHARD P. SCHULZE,
Attorney for Respondent.

Of Counsel:
C. G. STRATTON,
LOUIS M. WELSH,
ROBERT L. HARRISON,
of Los Angeles, California.

January, 1962.

APPENDIX.

PAGE

A.

Excerpts from Petitioner's "Answering Brief" and "Petition for Rehearing" before the Court of Appeals for the Ninth Circuit 1

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Affidavit of Robert L. Harrington..... 4

C.

National Sponge Cushion Co., Inc. v. The Mansfield Tire & Rubber Company, et al., No. 711-61-TC, Complaint for Infringement of United States Letters Patent No. 2,740,739, and Answer thereto..... 6

APPENDIX A.

In both petitioner's "Answering Brief" and in "Petition for Rehearing" before the Court of Appeals for the Ninth Circuit, in this case, petitioner presented the same argument that it is now presenting to the Supreme Court, to wit, that the present patented carpet underlay "must of necessity" and "would of inescapable necessity" be produced by the machine shown and described in patent '316. See the following excerpt from page 10 of said Answering Brief:

> "Having disclosed that the rubber facing may be of blowable sponge rubber and that it is soft enough to gravitate into the channels of the shaping drum, the only conceivable result is that the product of No. 2,480,316, when united with the open mesh fabric thereof without cement, as stated in that patent, *must of necessity* be that the blowable sponge rubber will project into and through the interstices of the open mesh fabric when subject to vulcanization, and that the flexible belt 18 will cause the projections of the sponge through the interstices to be flattened and widened as the rubber expands through the interstices during the flowing, thus providing the key-lock so strongly urged by plaintiff. Plaintiff has merely taken the product shown and described in prior Patent No. 2,480,316 in connection with the disclosure of the process or method, and has stated, in synonymous terms the obvious result of that method in describing and claiming the project of the patent in suit. . . .
>
> "In disclosing in prior patent No. 2,480,316 blowable rubber sponge connected to open mesh fabric

by vulcanization and without cement, Bodle has estopped himself from securing a valid patent on the product since his earlier patent issued over three years prior to the application for the patent in suit. Bodle is hoist by his own petard."

and the following from pages 24-25 of the same brief:

"Had the Exxaminer known of Blair and Bodle No. 2,480,316, he would also have known from that patent that the product illustrated in Fig. 1 thereof, without cement, as set forth in the patent specification, and comprising open-mesh fabric and blowable sponge rubber vulcanized thereto *would of inescapable necessity* comprise sponge rubber having a key-locking engagement with the fabric by reason of projections extending into and through the interstices of the fabric, that the projections would be larger, and that they would be the result of being formed and forced by pressure from a blowing agent. . . . If the blowhole sponge rubber of the patent in suit is forced by pressure of a blowing agent into and through the interstices of the fabric to provide a key-lock, then the identical materials under the identical conditions, i.e., the heat of vulcanization, must result in projections of the sponge under the force and pressure of a blowing agent into and through the interstices of the fabric and provide the key-lock." (Emphasis added.)

The petitioner concluded its said Petition for Rehearing as follows (see p. 17):

"In conclusion it is respectfully submitted that your Honors, for some reason, acquired a mis-

conception of the facts pointed out above which are highly significant and which clearly show that the patent in suit is invalid for the reason that the prior Blair-Bodle patent, not considered by the Patent Office, not only shows lack of patentable invention but that it teaches the manufacture of a product which is a complete anticipation of the patent in suit.

"It is respectfully requested that the finding of invalidity of the Court Below be accepted and adopted by this Court.

Respectfully submitted,

ALLAN D. MOCKABEE,

Attorney for Rubber Corporation of California."

APPENDIX B.

AFFIDAVIT OF ROBERT L. HARRINGTON

State of California,)
) ss.
County of Los Angeles)

ROBERT L. HARRINGTON, of the aforesaid County and State, being first duly sworn on oath deposes and says that he is an attorney at law admitted to practice before the Courts of the State of California and before this Honorable Court.*

That in its "Motion for New Trial Under Rule 59(a); For Relief from Judgment Under Rule 60(b); etc." filed in the Lower Court, whose decision on said Motion is under appeal here, the appellant (defendant below) stated (p. 3):

> "Under Rule 59(a) a new trial may be granted on the ground of newly discovered evidence which has been discovered since trial; which could not have been discovered before trial by the exercise of reasonable diligence; that it is material and will produce a result opposite to that which now prevails, and it is not cumulative, corroborative or collateral."

That said statement was contained in the Affidavit of Allan D. Mockabee dated April 13, 1961, filed in said action entitled "National Sponge Cushion Co., Inc., Plaintiff, vs. Rubber Corporation of California, Defendant," Civil Action No. 20438-TC.

*The United States Court of Appeals for the Ninth Circuit

That the above quotation was used as an argument by the defendant Rubber Corporation of California in support of said Motion.

Further affiant sayeth naught.

s ROBERT L. HARRINGTON

SUBSCRIBED and SWORN TO before me this 17th day of August, 1961.

s VESTA NELSON
a Notary Public in and for the State of California, with principal office in the County of Los Angeles.
My Commission expires Nov. 14, 1964

[NOTARIAL SEAL]

APPENDIX C.

C. G. Stratton
Robert L. Harrington
210 West 7th Street
Los Angeles 14, California
MAdison 5-2116
Attorneys for Plaintiff

In the District Court of the United States, Southern District of California, Central Division.

National Sponge Cushion Co., Inc., Plaintiff, vs. The Mansfield Tire & Rubber Company, a corporation; and Orcco Industries, Inc., a corporation, Defendants. Civil Action No. 711-61-TC.

COMPLAINT FOR INFRINGEMENT OF UNITED STATES LETTERS PATENT NO. 2,740,739

(JURY TRIAL DEMANDED)

Plaintiff complains of defendants and alleges:

I.

That this claim arises under the patent laws of the United States, and more particularly, under Title 35 USC Sec. 281, and that jurisdiction is conferred on this Court by Title 28 USC Sec. 1338(a).

II.

That the plaintiff is a corporation duly organized and existing under the laws of the State of California, and has its office and principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

III.

That on April 3, 1956, United States Letters Patent No. 2,740,739 were duly and legally issued to the above-named plaintiff for CARPET UNDERLAY, and that since that date, plaintiff has been and still is the owner of said patent.

IV.

The plaintiff is informed and believes, and upon information and belief alleges that the defendant The Mansfield Tire & Rubber Company is a corporation duly organized and existing under the laws of the State of Ohio, and has a factory and place of business in the City of Capistrano Beach, County of Orange, State of California.

V.

The plaintiff is informed and believes, and upon information and belief alleges that the defendant Orco Industries, Inc. is a corporation duly organized and existing under the laws of the State of California, and has its office and principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

VI.

That ever since April 3, 1956, the defendant The Mansfield Tire & Rubber Company has been infringing said patent by making, using and selling carpet underlay embodying the novel features disclosed and claimed in said patent, in the Southern District of California and elsewhere.

VII.

That ever since April 3, 1956, the defendant Orco Industries, Inc. has been infringing said patent by using, selling, offering for sale and advertising carpet underlay embodying the novel features disclosed and claimed in said patent, in the Southern District of California and elsewhere.

VIII.

That ever since April 3, 1956, each of the defendants The Mansfield Tire & Rubber Company and Orco Industries, Inc. has been contributing to the infringement of said patent by selling carpet underlay to third parties, and causing, aiding and abetting these third parties to infringe said patent by using or reselling the carpet underlay sold to them.

IX.

That the plaintiff has given written notice to each of the defendants The Mansfield Tire & Rubber Company and Orco Industries, Inc. of the said infringement, but that, despite such written notices, both of the defendants have thereafter wilfully and deliberately continued said infringement of said patent.

X.

That the plaintiff has been greatly damaged, and has suffered loss, because of the infringement and contributory infringement herein complained of, in the sum of Two Hundred Thousand Dollars ($200,000.00).

WHEREFORE, the plaintiff demands of the defendants:

(1) Judgment against the defendants for infringement of said patent:

(2) Damages in the sum of Two Hundred Thousand Dollars ($200,000.00);

(3) An assessment of reasonable attorney's fees and costs herein;

(4) Such other relief as to the Court appears just in the premises.

C. G. STRATTON
ROBERT L. HARRINGTON
Attorneys for Plaintiff
by C. G. Stratton

A jury trial in this case is hereby demanded.

By C. G. Stratton

Lyon & Lyon
Reginald E. Caughey
811 West Seventh Street
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Attorneys for Defendant
Orcco Industries, Inc.

Filed Dec. 4, 1961.

United States District Court, Southern District of California, Central Division.

National Sponge Cushion Co., Inc., Plaintiff vs. The Mansfield Tire & Rubber Company, a corporation; and Orcco Industries, Inc., a corporation, Defendants. Civil Action No. 711-61TC

ANSWER

DEFENDANTS, MANSFIELD TIRE & RUBBER COMPANY, and ORCCO INDUSTRIES, INC., referred to jointly as Defendants, in answer to the Complaint, state as follows:

1. Defendants admit the allegations of paragraph 1 of the Complaint;

2. Defendants are without knowledge or information sufficient to form a belief as to the matters alleged in paragraph 2 of the Complaint and therefore leave Plaintiff to its proof;

3. Defendants admit that on April 3, 1956, United States Letters Patent No. 2,740,739, hereinafter sometimes referred to as said patent, was duly issued but denies that the said patent was legally issued for the reasons more particularly set forth in paragraph 11 hereinafter set forth. Defendants are without knowledge or information sufficient to form a belief as to the other matters alleged in paragraph 3 of the Complaint and therefore leave Plaintiff to its proof;

4. Defendants admit the allegations of paragraph 4 of the Complaint;

5. Defendants admit the allegations of paragraph 5 of the Complaint;

6. Defendants deny the allegations of paragraph 6 of the Complaint;

7. Defendants deny the allegations of paragraph 7 of the Complaint;

8. Defendants deny the allegations of paragraph 8 of the Complaint;

9. Defendants admit that they have received a written notice from Plaintiff of the purported infringe-

ment of said United States Letters Patent No. 2,740,739 but deny that they either singly or jointly have either before or after such written notice willfully and deliberately infringed on said patent;

10. Defendants deny the allegations of paragraph 10 of the Complaint;

11. Defendants in further answer to the Complaint, allege that the said United States Letters Patent No. 2,740,739, or the claims thereof, which would cover or read upon any product or article of manufacture now or heretofore manufactured, used or sold by Defendant Mansfield, or used or sold by Defendant Orco or any customers or anyone associated with Defendants, are invalid, void and unenforceable for the following reasons:

A. The product or article of manufacture forming the subject matter of the claims of said patent is identical with or not patentably distinct from the product or article of manufacture naturally and inherently produced by practicing the method and using the materials and apparatus described in United States Letters Patent No. 2,480,316, in the name of G. W. Blair and V. H. Bodle entitled, "Method of Making Laminated Cushion Material" and issued August 30, 1949, a date more than one year prior to the filing date of the application which resulted in the issuance of said patent No. 2,740,739.

B. The purported novelty of the product or article of manufacture forming the subject matter of the claims of said patent was not the inventive act of the patentees of said patent, but is the natural, inherent, and unpreventable result of following the old and well-known process in the rubber industry of

1. Laying a sheet of coarse meshed fabric onto the top of a sheet of uncured rubber containing a compound which will produce gases when heated and

2. Then heating the uncured rubber

a. To produce a gas internally thereof and expand it into a sponge and

b. Then to cure the rubber in the expanded condition.

C. The purported novelty of the product or article forming the subject matter of the claims, namely, the method of fastening the rubber sheeting to the fabric backing, is the same as has been conventionally practiced by the rubber industry from a date at least prior to one year and in fact, for many years prior to the filing date of the application which issued into said patent.

D. The purported novelty of the product or the article of manufacture of the claims of said patent is not new and useful and therefore does not meet the requirements of 35 U. S. C. 101.

E. The differences or purported novelty between the product or article of manufacture forming the subject matter of the claims of said patent and the prior art are such that the subject matter as a whole would have been obvious at the time the purported invention was made to a person having ordinary skill in the art to which the subject matter pertains, such prior art including the practices and knowledge of the rubber industry and the following patents, and other patents and publications as to which Defendants pray leave to insert herein by amendment or otherwise to notify the Plaintiff as soon as and when full information relative thereto is obtained by the Defendants.

1,271,005	Bartlett	July 2, 1918
562,281	Coyte	June 16, 1896
1,457,826	Egerton	June 5, 1923
1,701,526	Bronson	February 12, 1929
1,766,471	Van Dusen	June 24, 1930
1,826,217	McConoughey	October 6, 1931
1,925,271	Miller	September 5, 1933
2,041,356	Kraft	May 19, 1936
2,075,373	Tomec	March 30, 1937
2,278,733	Peik	April 7, 1942
2,296,408	Todd	September 22, 1942
2,341,979	Cunnington	February 15, 1944
2,480,316	Blair	August 30, 1949
2,563,478	Mason	August 7, 1951
2,625,499	Nebesar	January 13, 1953
2,629,678	Thompson	February 24, 1953
2,642,920	Simon	June 23, 1953
2,703,775	Panagrossi	March 8, 1955

F. On information and belief the alleged invention purported to be patented by said patent was not the joint invention of the three named patentees but if an invention at all was the invention of only one or any two of said named patentees.

G. The purported invention was known or used by others in this country before the alleged invention thereof by the patentees to wit, by the parties specified in this paragraph, and particularly under subparagraph E of this paragraph and by others as to which the Defendants are not now fully advised, but as to which the Defendants pray leave to insert herein by amendment or otherwise to notify the Plaintiff as soon as

and when full information relative thereto is obtained by the Defendants.

H. The alleged invention purported to be patented in said patent was patented or described in printed publications in this and/or a foreign country before the alleged invention thereof as specified under subparagraph E of this paragraph and others as to which the Defendants are not now fully advised, but as to which the Defendants pray leave to insert herein by amendment or otherwise to notify the Plaintiff as soon as and when full information relative thereto is obtained by the Defendants.

I. The alleged invention purported to be patented in said patent was patented or described in a printed publication in this or a foreign country or was in public use or on sale in this country, more than one year prior to the date of the application by said patentee for said patent, as specified under subparagraph E of this paragraph and by others as to which the Defendants are not now fully advised, but as to which the Defendants pray leave to insert herein by amendment or otherwise to notify the Plaintiff as soon as and when full information relative thereto is obtained by the Defendants.

J. The alleged invention purported to be patented in said Letters Patent was described in patents granted on application for patent by others and the said patentees filed in the United States before the alleged invention thereof by the said patentees as specified under subparagraph E of this paragraph and in others as to which the Defendants are not now fully advised, but to which the Defendants pray leave to insert herein by amendment or otherwise to notify the Plaintiff as soon as and

when full information relative thereto is obtained by the Defendants.

WHEREFORE, DEFENDANTS having thus fully answered the Complaint, deny that the Plaintiff is entitled to the relief prayed for in the Complaint, or to any relief, and hence Defendants pray that the Complaint be dismissed with costs and reasonable attorneys' fees to the Defendants.

LYON & LYON

R. DOUGLAS LYON,
Attorneys for Defendant, The
Mansfield Tire & Rubber Company

VERNON J. BEEHLER
Attorney for Defendant
Orceo Industries, Inc.